88-595

NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

OFFSHORE EXPRESS, INC.,
Petitioner

VERSUS

BARBARA JOHNSON,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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31 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit erred in affirming the lower court's evaluation of the plaintiff's credibility regarding liability and allocation of fault in the amount of only twenty percent against the plaintiff in light of the fact that the plaintiff was known by the Court to provide substantial incredible testimony.

INTERESTED PARTIES

1. Barbara Johnson, Plaintiff/Respondent
2. Offshore Express, Inc., Defendant/ Petitioner[1]
3. American Steamship Owners, Inc., Defendant/Petitioner[2]
4. McAllister Brothers, Inc.[3]

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[1]Offshore Express, Inc. is a subsidiary corporation of McAllister Brothers, Inc.

[2]American Steamship Owners, Inc. is the protection and indemnity insurance underwriter.

[3]McAllister Brothers, Inc.is the parent corporation of Offshore Express, Inc.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

OFFSHORE EXPRESS, INC., Petitioner

VERSUS

BARBARA JOHNSON, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

The Petitioner, Offshore Express, Inc., respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered June 3, 1988.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals appears in the index.

The oral rulings of the United States District Court for the Eastern District of Louisiana, on the Motion for New Trial appears in the appendix.

The oral ruling of the United States District Court for the Eastern District of Louisiana on the original trial appears in the index.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 3, 1988. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C.A., Rule 17.1(a), Supreme Court Rules. Considerations Governing Review on Certiorari.

.1. A review on writ on certiorari it is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in

conflict with a state court of last resort; or has so far departed from the acceptable and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

***[1]

28 U.S.C.A., Federal Rules of Civil Procedure, Rule 52(a). **Findings by the Court.**

Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find

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[1]U.S.C.A. Supreme Court Rule 17.1(b) and (c) are omitted since they are not at issue in this petition.

the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Findings of a master, to the extent that the court adopts them, shall be considered as the findings of

> the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).
>
> ***[2]

STATEMENT OF THE CASE

On or about April 22, 1983, Respondent, Barbara Johnson ("Johnson"), was employed by Offshore Express and assigned to M/V CHAMPION EXPRESS as an

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[2]28 U.S.C.A., Federal Rules of Civil Procedure 52(b) is omitted since it is not at issue in this petition.

able-bodied seaman to perform sanitation and maintenance duties inside the enclosed cabin area of the vessel. On that same date, Johnson was ordered by Captain Daniel Frudeker and mate, James Clay, to make up the bunks in the passenger quarters of M/V CHAMPION EXPRESS in preparation for the berthing of Amoco personnel. The vessel was at the dock at the time that these orders were initially issued. Despite these orders, Johnson did not comply. Eventually, the vessel was ordered offshore pursuant to its service contract with Amoco.

Over the next four days, Captain Frudeker and Mate Clay repeatedly reiterated their order that Johnson make up the bunks in the living quarters before the Amoco passengers boarded. On April 27, 1983 while M/V CHAMPION EXPRESS

was moored with its starboard side to an Amoco platform and preparing to take on Amoco passengers, Mate Clay again asked Johnson to make up the bunks as previously requested.

After having been given the repeated order to make up the bunks in the cabin, Johnson finally began the task at approximately 6:00 p.m. on the evening of April 27, 1983. Dennis Olson ("Olson"), the engineer on board M/V CHAMPION EXPRESS, an ordained minister, testified that he saw Johnson making up bunks in the assigned passenger cabin at approximately 6:00 p.m. that evening. At that time, Olson went into the cabin while Johnson was making up the bunks and spoke to her. She told him she was having a dizzy spell and needed to sit down and take a rest for a while. Olson then offered to help Johnson

make the remaining bunks, but she refused. Olson also offered to get another crewman to assist Johnson in making up the bunks but she again refused, stating that she would take care of it herself. Having been refused his assistance, Olson then departed the cabin.

Approximately ten to fifteen minutes later, Respondent reported that she had fallen from a top bunk onto the deck of the cabin landing on her lower back or coccyx. As a result of this accident, Respondent claimed to have sustained an injury to her low back causing severe neurological injury to the nerve roots in her lower back and urological system, thereby allegedly resulting in disability and disfigurement.

Evidence of Respondent's medical history prior to her alleged accident of April 27, 1983 was presented at trial.

This evidence tracks the numerous incidents of Johnson's life which were germane to the issues of her credibility.

Prior to Respondent's employment with Offshore Express, Inc., she began a series of medical complications which began after her pregnancy with her fourth child in the 1960's. As a result of these complications, she underwent bladder suspension surgery to minimize the effects of urinary stress incontinence. In December of 1979, she injured her lower back when she slipped on ice while working for a circus troop in Leesville, Louisiana. She was admitted to Byrd Memorial Hospital in Leesville and underwent treatment for her back injury as well as constipation and abdominal pain for eleven days thereafter. Johnson continued to experience abdominal and neurological problems and complained

about such problems to her fellow workers at Offshore Express, Inc. during the time of her employment with Offshore Express, Inc. and up until the time of her accident.

In November of 1982, when Johnson filled out the standard Offshore Express, Inc. application while seeking employment, she answered "no" to questions asking whether she had any major illnesses and to whether she had ever previously hurt or injured her back. Nor did Johnson indicate on her employment application that she underwent treatment in 1977 for urinary stress incontinence as well as urogenital ailments.

At trial, the plaintiff testified that she did not consider the eleven-day hospitalization for her back injury to be significant, nor did she recall ever going

to a urologist prior to the accident on board M/V CHAMPION EXPRESS. This testimony was elicited by Respondent despite documentary evidence verifying the eleven-day stay at Byrd Memorial Hospital and the performance of several urogenital surgeries for which her urinary stress incontinence was treated.

The trial testimonies of the cook on board M/V CHAMPION EXPRESS, Bob Jones, and the engineer, Dennis Olson, further corroborated that Johnson had abdominal and urological problems pre-existing the accident. Dennis Olson testified that Johnson discussed in length her previous bladder surgery problems and the need to have further bladder surgery in order to engage in sexual relations.

From April 28, 1983, the day after Johnson's alleged injury, she continued to

chart a perplexing and complicated course of medical treatment which encompassed almost one and one-half years of constant hospitalization, two surgeries, the second necessitated by surgical complications originating from her first surgery, months of physical therapy and admission and discharge from two separate pain clinics. As a result of allegedly falling from the upper berth of M/V CHAMPION EXPRESS, Johnson claimed to have been rendered permanently disabled from any future employment and to have sustained disfigurement, pain and suffering as well as chronic urinary incontinence.

During Johnson's near one and one-half years of medical treatment, she was examined by a litany of urologists, neurologists, orthopaedic surgeons, physical therapists and psychiatrists. To

none of these doctors did Johnson provide a history of the prior urological condition and treatment nor of the prior hospitalization for the back injury.

Almost immediately after the April 1983 accident, Johnson began to exhibit a ten degree hip flexion and internal rotation of the left foot. None of the doctors that rendered treatment to Respondent during this time could ever medically or scientifically explain the etiology or cause for the internal hip rotation. Additionally, during each examination, Respondent exhibited not only the inverted hip and foot rotation but also a significant difficulty in ambulation without the assistance of crutches.

From August to December of 1985, Petitioner conducted intermittent surveillance upon Respondent at her

apartment in East New Orleans. Six different episodes were taken of Johnson swimming, walking to and from her apartment, exiting a taxicab at a doctor's office and walking to his office for an examination and exiting his office after the examination. This information was compiled on video tapes showing Respondent walking in a normal manner without an inverted hip or foot rotation. In fact, after reviewing the video tape footage of Respondent exiting his office after an examination, Dr. Richard Warren Levy, a neurosurgeon, completely revised his opinion and analysis of Respondent's condition, subtracting whatever disability he thought there might be from the positioning of the left leg and foot.

Johnson's misrepresentations and deceptions reached a pinnacle at trial

when she appeared on crutches and exhibited the false hip rotation, the trunk list and all other symptoms she had fabricated during her lengthy treatment. She walked haltingly and unsteadily in the courtroom, frequently exiting the courtroom during the testimony of other witnesses, ostensibly to demonstrate to the court the serious nature of the longstanding bladder problem she was attempting to attribute to this case. Johnson even demonstrated her inverted hip to the court as well as her inability to walk more than a few steps.

At the conclusion of the trial, the lower court rendered judgment assessing eighty percent fault against Offshore Express, Inc. and twenty percent against Respondent. Despite the litany of inconsistency and misrepresentations, the

court totally disregarded the testimony of Dennis Olson that he had offered assistance in making up the bunks to Johnson prior to the accident, and instead ruled that Offshore Express, Inc. was negligent in failing to offer assistance to Johnson in making up the bunks. The Court awarded Johnson in excess of $600,000 for pain and suffering, disfigurement and loss of wages.

After the lower court's ruling, Offshore Express, Inc. filed an appeal with the Fifth Circuit Court of Appeals. During the pendency of the appeal, approximately six months after the trial, Barbara Johnson was arrested, along with her son and twelve other individuals, by U.S. Customs Service agents in connection with an investigation into a conspiracy to over throw the government of the Republic

of Surname. On November 5, 1986, Respondent was sentenced to one year in federal prison.

Prior to the date of her arrest, Johnson was observed engaging in normal activities and exhibiting no problem walking distances with the exception of a slight limp and the occasional use of a folding cane. At the time of her arrest, she inquired whether or not there might be cameras covering the arrest. After being transported to the Customs House in New Orleans, Louisiana for processing, Johnson was suddenly observed to be unable to walk unassisted. At that time, she claimed that she required a wheelchair and again assumed the listing posture with the inverted foot and maintained this posture through the arrest processing procedure. This posturing was also assumed throughout her

arraignment and sentencing.

On February 23, 1987, Offshore Express, Inc. filed a Motion for New Trial under Federal Rules of Civil Procedure 60(b). Offshore Express, Inc. asserted two grounds for the Motion for New Trial: the newly discovered evidence of Johnson's post-trial activities; and, alleged fraud, misrepresentation and misconduct by Johnson during the previous trial. The Motion for New Trial was supported by the affidavits and depositions of the two customs agents who had worked undercover in connection with investigating the conspiracy. On March 8, 1987, the Court denied the Motion for New Trial. At that time, the lower court issued the following oral reasons for its ruling:

> (1) Maybe Barbara Johnson was not a 100% credible, . . .

(2) I have got the testimony of two agents who saw her and it was speculation on their part, that just because she asked if there are going to be cameras, you know when they said 'yes', she immediately went into that floppy look. She did that here, that's why I said she needed psychiatric treatment. I mean, she made herself all bent up. She was a contortionist.

(3) But that's not what I based my ruling on, not on exaggerations or the acting which she did. It was based upon the medical testimony, not Barbara Johnson's testimony and that is something that I want the record to be very clear so that the Fifth Circuit knows it wasn't because I believed everything that Barbara Johnson told me.

(4) Let me tell you, I looked long and hard at Barbara Johnson. She did exaggerate. I looked at her and I said 'I wonder if she has just completely fooled these doctors', because that is what I based my ruling on, not on her testimony.

The appeal of the original district court decision was consolidated with the appeal of the district court, ruling on the new trial motion. In its decision,

the Fifth Circuit concluded that the 80%-20% allocation of fault was supported by the record. The Fifth Circuit also acknowledged that the district judge did not believe everything that Johnson had said during the trial. Specifically, the circuit court noted that the district court discounted Johnson's testimony and her contrived appearances in the trial. Additionally, the circuit court explained that the district court accepted the fact that Johnson may not have been fairly candid with the court and did not rely upon her testimony. Despite this fact, the circuit court affirmed the district court's credibility determination of Barbara Johnson's testimony regarding whether assistance was offered by Dennis Olson. The circuit court did not scrutinize the lower court's assessment of Dennis Olson's

credibility nor the absence of factual finding explaining the lower court's disregarding his testimony, despite the fact that this testimony was critical in determining the fault of the parties.

REASON FOR GRANTING WRIT

The United States Court of Appeals for the Fifth Circuit erred in not finding that the lower court's credibility determination of Respondent's testimony regarding not being offered assistance by Dennis Olson prior to the incident was clearly erroneous. This error constituted a far departure from the accepted and usual course of judicial proceedings.

In affirming the district court's allocation of fault between Offshore Express, Inc. and Respondent and its determination of Respondent's credibility in favor of that of Dennis Olson, the

Fifth Circuit has not only failed to abide by its standard of review, but has condoned judicial reasoning that does not reflect the truth and right of the case. Clearly, the Fifth Circuit's failure to acknowledge the inconsistency in the lower court's credibility determination of Barbara Johnson's testimony constitutes a far departure from the clearly erroneous standard of review imposed upon circuit courts in reviewing the decisions of lower courts. As acknowledged by the district court and the circuit court, the record is replete with testimony and evidence discrediting the credibility of the Respondent, not only with regard to her medical condition but with regard to liability as well. In light of this fact, the circuit court failed to adequately review the record to determine whether the

court's findings regarding liability were clearly erroneous. Had the reviewing court exercised proper review and scrutiny over the lower court's findings with regard to Respondent's credibility, it would have discovered the clear error in the lower court's analysis. The district court disregarded Johnson's testimony with regard to her physical and medical condition and her contrived appearances and yet gave full credence, without any explanation to her testimony regarding whether assistance was offered. This finding belies rational judicial reasoning. Here, the lower court's finding is not only clearly erroneous but is internally inconsistent without findings of fact in support of the court's reasons to discredit the testimony of Dennis Olson.

It is well settled that a finding of

fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). It is the obligation of the reviewing court to reverse the findings of the lower court when the result in a particular case does not reflect the truth and the right of the case. Armstrong Cork Company v. World Carpets, Inc., 597 F.2d 496, 501 (5th Cir. 1969); Amstar Corporation v. Domino's Pizza, Inc., 615 F.2d 252 (5th Cir. 1980).

It is further the responsibility of the appellate court reviewing the facts of the district court to review the record to determine if those facts were clearly

erroneous. McAllister v. United States, 348 U.S. 19, 20, 75 S.Ct. 6, 8, 99 L.Ed. 20 (1954). While the appellate court generally gives great deference to the credibility resolutions of the finder of fact, the reviewing court need not accept the ultimate findings of fact of the trial court where such determinations are: (1) completely devoid of minimal evidentiary support displaying some hue of credibility; or, (2) bear no rational relationship to supportive evidentiary data. Rochez Bros., Inc. v. Rhoades, 527 F.2d 880 (3d Cir. 1975); Crasnov v. Dinan, 465 F.2d 1298 (3d Cir. 1972). Additionally, when the lower court's theory of credibility is faulty, then the credibility resolution itself must fall. Custom Recovery, Division of Keystone v. N.L.R.B., 597 F.2d 1041 (5th Cir. 1979);

N.L.R.B. v. Florida Citrus Canners Coop, 311 F.2d 541 (5th Cir. 1963).

It is submitted that the obvious inconsistency between the lower court's determination of Barbara Johnson's credibility reveals not only a significant fault in the court's theory of credibility but also a clear contradiction in the court's analysis of Barbara Johnson's testimony. In other words, if the lower court did not believe everything that Johnson said during trial and further did not rely upon her testimony with regard to her physical and medical representations, then why did the court chose to discredit the testimony of Dennis Olson and believe the testimony of Barbara Johnson without any explanation as to why Dennis Olson's testimony was discredited?

While Rule 52(a) of the Federal Code

of Civil Procedure does not require that the trial court set out findings on all of the factual questions that arise in a case, the findings and conclusions must be expressed with sufficient particularity to allow the reviewing court to determine rather than speculate that the law has been correctly applied. Curtis v. Cir, 623 F.2d 1047 (5th Cir. 1980); Hydrospace-Challenger, Inc. v. Tracor-MAS, Inc., 520 F.2d 1030, 1034 (5th Cir. 1975). The findings of the trial court must be sufficiently detailed to give the reviewing court a clear understanding of the analytical process by which the ultimate findings were reached. The process assures that the trial court took care in ascertaining the facts. Curtis, supra.

Absent sufficient explanation as to the lower court's analytical process in

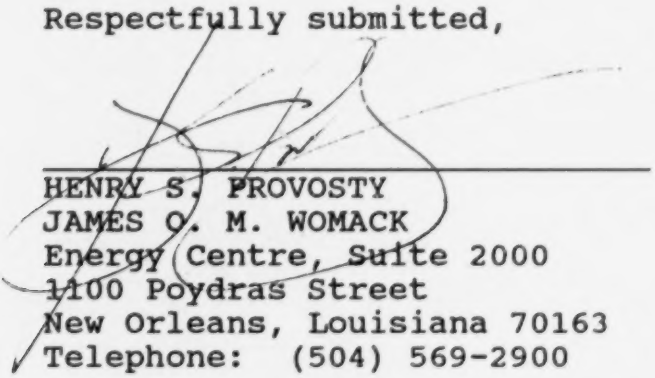
weighing the testimony of Barbara Johnson over that of Dennis Olson, it is submitted that the lower court erred in failing to challenge that finding as inadequate to give a clear understanding of the process by which the court's ultimate conclusions were reached. Clearly, without explanation as to why Dennis Olson's testimony regarding assistance given to Barbara Johnson prior to the accident was discounted in favor of Respondent's testimony, which was clearly deemed suspect and unreliable, such findings were clearly erroneous. Accordingly, the review court's failure to acknowledge this omission and contradiction in the court's ruling constituted a far departure from the accepted and usual course of appellate review.

CONCLUSION

The testimony of Dennis Olson that he offered Barbara Johnson assistance in making up the bunks prior to her accident was disregarded by the lower court in the absence of any rational relationship with the court's determination of the credibility of such testimony. The lower court's failure to provide findings of fact explaining its rationale for disregarding the testimony of Dennis Olson, in light of the court's repeated acknowledgement of Respondent's incredibility, was clearly erroneous. Accordingly, the reviewing court's failure to fully analyze the record and identify the lower court's fault in analyzing Respondent's credibility clearly constituted a blatant error in the judicial proceedings of the court.

For the above and foregoing reasons, Petitioner respectfully submit that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing pleading has been served on all counsel of record by depositing same in the United States Mail, postage prepaid, addressed to them at their respective offices, this 26th day of September 1988.

HENRY S. PROVOSTY